

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REVOLUTION HEALTH GROUP, LLC)	CASE NO. 08 CV 3464 (GEL)
)	
Plaintiff)	ECF CASE
)	
v.)	
)	<u>NOTICE OF REMOVAL</u>
HUMMINGBIRD COACHING SERVICES, LLC)	
)	
Defendant.)	

Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, Defendant Hummingbird Coaching Services, LLC (“Hummingbird”) gives notice of removal of the above-captioned action from the Supreme Court of the State of New York, New York County, to the United States District Court for the Southern District of New York based on diversity jurisdiction. In support of this notice of removal, Hummingbird states as follows:

1. On February 29, 2008 Plaintiff Revolution Health Group, LLC (“Revolution”) filed an action against Hummingbird in the Supreme Court of New York, New York County, Index No. 08600607 (hereinafter the “state court action”).
2. On March 11, 2008, Hummingbird was served with a summons and complaint in the state court action. Copies of the Summons and Complaint are attached as **Exhibit A**. Hummingbird also attaches from the state court action as **Exhibit B** copies of the Affidavit of Service, Request for Judicial Intervention, and Statement in Support of Request for Assignment to Commercial Division. Exhibits A and B comprise all documents served upon Hummingbird in the state court action.
3. No further pleadings have been served on Hummingbird, and no further proceedings have taken place in the state court action.

4. Hummingbird is an Ohio limited liability company with its principal place of business at 312 Walnut Street, Suite 1020, Cincinnati, Ohio. Revolution served the Complaint upon Hummingbird at Hummingbird's principal place of business in Cincinnati, Ohio. (Ex. A). All of Hummingbird's members are citizens and residents of the State of Ohio.

5. Revolution is a Delaware limited liability company with its principal place of business at 1717 Rhode Island NW, Washington, D.C. Upon information and belief, none of Revolution's members are citizens and residents of the State of Ohio.

6. Revolution seeks, among other remedies, damages in the amount of \$155,726.65. (Complaint, at Ex. A).

7. Diversity jurisdiction exists over this action under 28 U.S.C. § 1332(a) in that this is a dispute between citizens and/or members of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

8. Because this action falls within the Court's original jurisdiction under 28 U.S.C. § 1332(a), removal is appropriate under 28 U.S.C. § 1441(a).

9. The United States District Court for the Southern District of New York is the district court for the judicial district and division embracing New York County, where the state court action is pending. 28 U.S.C. § 112(b).

10. This notice of removal is filed within 30 days after service of the summons and complaint on Hummingbird and is timely under 28 U.S.C. § 1446(b).

11. Hummingbird is simultaneously filing a copy of this Notice of Removal with the Supreme Court of New York, New York County, a copy of which filing is attached hereto as **Exhibit C**. The notice of removal has also been served on Revolution's counsel.

For the foregoing reasons, federal jurisdiction exists under 28 U.S.C. § 1332(a), and removal is appropriate under 28 U.S.C. § 1441(a). Defendant Hummingbird Coaching Services, LLC respectfully requests that this Court enter the appropriate orders to affect the removal of this case from the Supreme Court of New York, New York County to this Court.

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: s/ Brian J. Butler

Brian J. Butler (BB3493)

One Lincoln Center

Syracuse, New York 13202

Telephone: (315) 218-8000

Fax: (315) 218-8100

Email: butlerb@bsk.com

and

TAFT STETTINIUS & HOLLISTER LLP

Maria P. Vitullo (MV0141)

425 Walnut Street, Suite 1800

Cincinnati, OH 45202-3957

Telephone: (513) 381-2838

Fax: (513) 381-0205

Email: vitullo@taftlaw.com

Attorneys for Defendant

Exhibit A

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART**

REVOLUTION HEALTH GROUP, LLC,

Plaintiff,

-against-

HUMMINGBIRD COACHING SERVICES,
LLC,

Defendant.

08600607

Index No.: _____/08

SUMMONS

FILED
FEB 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

TO: Hummingbird Coaching Services, LLC
312 Walnut Street
Suite 1020
Cincinnati, Ohio 45202

YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's attorney an Answer to the Complaint in this action within twenty days after the service of this Summons, exclusive of the day of service, or within thirty days after service is complete if this Summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the Complaint.

00050178.doc

Plaintiff designates New York County as the place of trial.

Dated: New York, New York
February 29, 2008

SCHLAM STONE & DOLAN LLP

By: David J. Katz
Jeffrey M. Eilender 1203
David J. Katz
26 Broadway
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
Attorneys for Plaintiff

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART**

REVOLUTION HEALTH GROUP, LLC,

Plaintiff,

-against-

HUMMINGBIRD COACHING SERVICES,
LLC,

Defendant.

Index No.: 08600607
/08

COMPLAINT

Plaintiff Revolution Health Group, LLC ("Revolution"), by its undersigned counsel, for its Complaint against Defendant Hummingbird Coaching Services, LLC ("Hummingbird"), alleges as follows:

INTRODUCTION

1. This is an action by a provider of health care information services against its vendors for declaratory and monetary relief. Specifically, Hummingbird is threatening to sue Revolution for breaching a services "agreement" that is nothing more than an agreement to agree, because key material terms — the entire Statement of Work and the prices at which the services were to be performed — were left for future negotiations and never agreed upon. Thus, Revolution seeks a declaration that the contract is unenforceable and seeks to recoup approximately \$156,000 in good faith payments it made to Hummingbird while these terms were under negotiation and for which Revolution never received any services or other benefits from Hummingbird.

FILED
FEB 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

A. The Parties

2. Revolution offers, among other things, a consumer health and wellness information service through revolutionhealth.com and premium services that enable employers to provide health content and customized online tools to their employees, including customized portals, employee wellness incentives and telephonic services. Revolution maintains a sales office in at 317 Madison Avenue, New York, New York.

3. On information and belief, Hummingbird provides, among other things, global coaching services to help individual improve their lives.

B. The Parties' Agreement to Agree

4. In 2006, the parties began negotiating a transaction pursuant to which Hummingbird would provide coaching services to Revolution, which Revolution would, in turn, offer to its customers.

5. As a spring board for the negotiation of a final, complete, and binding agreement, on or about October 12, 2006, the parties executed a document entitled "Application and Services Provider Agreement" ("ASPA").

6. Although titled an "agreement," the ASPA is missing two material terms that are common in every services agreement.

7. First, it is missing a Statement of Work, which was to provide a mutually agreed upon, detailed description of the services to be provided by Hummingbird to Revolution and which was to be signed by both parties.

8. Second, it is missing the prices at which the services contemplated in the Statement of Work are to be provided.

9. Instead, the ASPA provides that Revolution will pay Hummingbird at least \$400,000 during the first year of a two-year term and at least \$800,000 during the second year. As noted above, however, the ASPA nowhere states what services are to be provided in exchange for these monies or at what prices such services are to be offered.

10. Finally, the ASPA provides that it is to be governed by New York law and that “[a]ll actions or proceedings arising out of or relating to this Agreement, its validity, performance, enforcement, or breach, or the subject matter of this Agreement, shall be exclusively adjudicated in state or federal court in the State of New York and the parties hereby irrevocably consent and submit themselves to the personal jurisdiction of said courts for all such purposes.”

C. The Parties Fail to Reach Agreement on the Missing Material Terms

11. From in or about October 2006, until in or about February 2008, the parties negotiated in good faith in an attempt to reach an agreement on the missing material terms of the ASPA, *i.e.*, the services to be provided and the prices at which those services were to be provided. They never reached an agreement on these material terms.

12. During the course of these negotiations, Revolution made two good faith payments to Hummingbird as advances against which future services were to be provided. Specifically, on or about February 16, 2007, Revolution paid Hummingbird \$55,726.65, and on or about August 3, 2007, Revolution paid Hummingbird \$100,000. As of the filing of this Complaint, Hummingbird never provided Revolution with any services or other benefits in exchange for the \$155,726.65 paid by Revolution.

D. Hummingbird Threatens to Sue Revolution for Breach of Their Agreement to Agree

13. By letter dated February 21, 2008,¹ and addressed to Revolution's Chief Executive Officer, Hummingbird's outside counsel accused Revolution of being in default of its obligations under the ASPA and being in anticipatory breach of the ASPA.

14. Specifically, the letter states that "[b]ecause Revolution failed to pay \$100,000 on September 30, 2007, it is in material breach of the Agreement" and that the entire unpaid balance of the \$1.2 million minimum revenue stream referenced above was due and owing.

15. Finally, the letter closed with a threat to sue Revolution for breach of contract in New York if it Hummingbird's counsel did not receive a response by March 2, 2008.

**AS AND FOR A FIRST, SEPARATE
AND DISTINCT CAUSE OF ACTION
(DECLARATORY JUDGMENT)**

16. Revolution repeats, reiterates, and realleges each and every allegation contained in Paragraphs enumerated 1-15 of the within Complaint as if more fully set forth at length herein.

17. As described above, there exists a dispute between Revolution and Hummingbird with respect to whether the ASPA is an enforceable contract. This dispute is ripe for adjudication, and Revolution does not have an adequate remedy at law.

18. Accordingly, Revolution requests a declaratory judgment that (a) the ASPA is not an enforceable contract, (b) the ASPA imposes no legal obligations on the parties, and (c) Revolution is not liable to Hummingbird for its failure to perform any obligations contained in the ASPA.

¹ A copy of this letter is attached hereto as Exhibit 1.

**AS AND FOR A SECOND SEPARATE
AND DISTINCT CAUSE OF ACTION
(UNJUST ENRICHMENT)**

19. Revolution repeats, reiterates, and realleges each and every allegation contained in Paragraphs enumerated 1-18 of the within Complaint as if more fully set forth at length herein.

20. Hummingbird obtained \$155,726.65 from Revolution without providing Revolution any services or other benefits and thus unfairly received a substantial benefit at the expense of Revolution.

21. It would be inequitable for Hummingbird to continue to enjoy this benefit, and thus it should be held liable for unjust enrichment.

WHEREFORE, Revolution demands judgment in its favor and against Hummingbird:

A. On the First Cause of Action, for a declaration that (i) the ASPA is not an enforceable contract, (ii) the ASPA imposes no legal obligations on the parties, and (iii) Revolution is not liable to Hummingbird for its failure to perform any obligations contained in the ASPA; and

B. On the Second Cause of Action, for unjust enrichment, in an amount to be determined at trial but no less than \$155,726.65, plus prejudgment interest and costs; and

C. On all causes of Action, granting to Revolution such other and further relief as

to this Court seems just and proper.

Dated: New York, New York
February 29, 2008

SCHLAM STONE & DOLAN LLP

By: David J. Katz
Jeffrey M. Eilender 'RDB
David J. Katz
26 Broadway
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
Attorneys for Plaintiff

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

REVOLUTION HEALTH GROUP, LLC,

Plaintiff,

-against-

HUMMINGBIRD COACHING SERVICES,
LLC,

Defendant.

Index No.: _____/08

SUMMONS AND COMPLAINT

SCHLAM STONE & DOLAN LLP

26 Broadway
New York, New York 10004
(212) 344-5400

Attorneys for Plaintiff

Exhibit B

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART

REVOLUTION HEALTH GROUP, LLC,

PLAINTIFF

v.

HUMMINGBIRD COACHING SERVICES, LLC

DEFENDANT

CASE No. 600607/08

AFFIDAVIT OF SERVICE

STATE OF OHIO)

COUNTY OF HAMILTON)

)
ss.
)

TO: HUMMINGBIRD COACHING SERVICES, LLC
312 WALNUT STREET
SUITE 1020
CINCINNATI, OH 45202

KIRK McCRACKEN PERSONALLY APPEARED BEFORE ME, WHO BEING FIRST
DULY SWORN, SAYS THAT HE SERVED A COPY OF THE ATTACHED SUMMONS, COMPLAINT, AND
ACCOMPANYING DOCUMENTS UPON THE ABOVE NAMED PARTY ON THE 11 DAY OF MARCH
2008, AT APPROXIMATELY 4:30 P.M.

- () BY DELIVERING TO AND LEAVING WITH THE NOTICED PARTY PERSONALLY;
() BY DELIVERING TO AND LEAVING WITH _____ A PERSON OF DISCRETION
RESIDING AT THE RESIDENCE OF THE SAID NOTICED PARTY;
() BY DELIVERING AND LEAVING WITH _____ THE REGISTERED AGENT
FOR THE NOTICED PARTY;
☒ BY DELIVERING AND LEAVING WITH LANA TAYLOR, ACCOUNT REP AN EMPLOYEE OF THE
BUSINESS LISTED FOR THE NOTICED PARTY, AUTHORIZED TO ACCEPT SERVICE.
() UPON BEING INSTRUCTED BY _____ LEFT
A COPY OF SAID ABOVE REFERENCED DOCUMENTS AT/WITH _____

_____ ON THE _____ DAY OF _____, 2, AT
APPROXIMATELY _____ M.

() SERVICE NOT OBTAINED (PLEASE SEE NOTES BELOW)

(NOTES)

W/F/BRN HL/BRN EYES/5'5/ APPROX 45 YRS

RECEIVED BY: Lana M. Taylor SERVICE DATE: 3/11/08 TIME: 4:35 PM

PROCESS SERVER
LITIGATION SUPPORT SERVICES
817 MAIN STREET, STE. 400
CINCINNATI, OHIO 45202-2153

SWORN TO BEFORE ME THIS 11 DAY OF MARCH 2008

Thomas E. Sabush
NOTARY PUBLIC — STATE OF OHIO & KENTUCKY
MY COMMISSION EXPIRES: 2/15/10

UCS-840 (REV 1/2000)

REQUEST FOR JUDICIAL INTERVENTION

Supreme New York 600607/2008 2/29/2008
COURT COUNTY INDEX NO. DATE PURCHASED

For Clerk Only
003788
IAS entry date
Judge Assigned
RJI Date

PLAINTIFF(S):

REVOLUTION HEALTH GROUP, LLC,

DEFENDANT(S): -against-

HUMMINGBIRD COACHING SERVICES, LLC,

Date issue joined: Bill of particulars served (Y/N): ☐ Yes ☒ No

NATURE OF JUDICIAL INTERVENTION (check ONE box only AND enter information)

- | | |
|---|---|
| <input type="checkbox"/> Request for preliminary conference | Notice of petition (return date: _____) |
| <input type="checkbox"/> Note of issue and/or certificate of readiness | Relief sought _____ |
| <input type="checkbox"/> Notice of motion (return date: _____) | Notice of medical or dental malpractice action (specify: _____) |
| Relief sought _____ | Statement of net worth |
| <input type="checkbox"/> Order to show cause (clerk enter return date: _____) | Writ of habeas corpus |
| Relief sought _____ | <input checked="" type="checkbox"/> Other (specify: Assignment to |
| <input type="checkbox"/> Other ex parte application (specify: _____) | Commercial Division VAL 3 |

INDEX NUMBER 600607 YEAR 2008
6 RJI FEE 95.00
TOTAL 95.00
CHECK 95.00

NATURE OF ACTION OR PROCEEDING (Check ONE box only)

MATRIMONIAL

- | | |
|--------------------------------------|-----|
| <input type="checkbox"/> Contested | -CM |
| <input type="checkbox"/> Uncontested | -UM |

COMMERCIAL

- | | |
|--|-------|
| <input checked="" type="checkbox"/> Contract | -CONT |
| Corporate | -CORP |
| Insurance (where insurer is a party, except arbitration) | -INS |
| <input type="checkbox"/> UCC (including sales, negotiable instruments) | -UCC |
| <input type="checkbox"/> *Other Commercial | -OC |

REAL PROPERTY

- | | |
|--|-------|
| Tax Certiorari | -TAX |
| <input type="checkbox"/> Foreclosure | -FOR |
| <input type="checkbox"/> Condemnation | -COND |
| <input type="checkbox"/> Landlord/Tenant | -LT |
| *Other Real Property | -ORP |

OTHER MATTERS

- | | |
|--|------|
| | -OTH |
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TORTS

Malpractice

- | |
|--|
| <input type="checkbox"/> Medical/Podiatric |
| <input type="checkbox"/> Dental |
| <input type="checkbox"/> *Other Professional |

- | | |
|--|------|
| <input type="checkbox"/> Motor Vehicle | -MV |
| *Products Liability | -PL |
| <input type="checkbox"/> Environmental | -EN |
| <input type="checkbox"/> Asbestos | -ASB |
| <input type="checkbox"/> Breast Implant | -BI |
| <input type="checkbox"/> *Other Negligence | -OTN |
| <input type="checkbox"/> *Other Tort (including intentional) | -OT |

SPECIAL PROCEEDINGS

- | | |
|---|----------|
| Art. 75 (Arbitration) | -ART75 |
| <input type="checkbox"/> Art. 77 (Trusts) | -ART77 |
| Art. 78 | -ART78 |
| <input type="checkbox"/> Election Law | -ELEC |
| Guardianship (MHL Art. 81) | -GUARD81 |
| *Other Mental Hygiene | -MHYG |
| *Other Special Proceeding | -OSP |

CONS CASHIER DATE TIME TERM
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

REVOLUTION HEALTH GROUP, LLC,
Plaintiff,

-against-

HUMMINGBIRD COACHING SERVICES,
LLC,
Defendant.

Index No.: 600607/08

**STATEMENT IN SUPPORT OF
REQUEST FOR ASSIGNMENT TO
COMMERCIAL DIVISION**

I, **DAVID J. KATZ**, am an attorney employed by Schlam Stone & Dolan LLP, counsel for Plaintiff Revolution Health Group, LLC in this matter. I submit this Statement and accompanying copy of the pleadings pursuant to Section 202.70(d)(2) of the Uniform Rules for the Trial Courts, in support of the request of said parties for the assignment of this matter to the Commercial Division of this Court.

(1) I have reviewed the standards for assignment of cases to the Commercial Division set forth in Section 202.70. The case meets those standards. I therefore request that this case be assigned to the Division.

(2) The sums at issue in this case (exclusive of punitive damages, interest, costs, disbursements, and counsel fees claimed) are equal to or in excess of the monetary threshold of the Division in this county as set out in Subdivision(a) of said Section, or equitable or declaratory relief is sought, in that the First Cause of Action seeks a declaratory judgment with respect to contractual amounts allegedly owed to the Defendant, and the Second Cause of Action seeks no less than \$155,726.65 for unjust enrichment.

(3) This case falls within the standards set out in Subdivision (b) of the Section and does not come within the groups of cases set out in Subdivision (c) that will not be heard in the

Division, in that this is not: (1) a suit to collect professional fees, (2) a case seeking a declaratory judgment as to insurance coverage for personal injury or property damage, (3) a residential real estate dispute of any kind, (4) a proceeding to enforce a judgment, (5) a first-party insurance claim or action by an insurer, or (6) an attorney malpractice action.

(4) This is an action brought by a provider of health care information services against one of its vendors seeking a declaration that there was no enforceable contract signed by them and further seeking the return of certain monies paid to the vendor on account for services that were to be provided if and when the material terms of the parties' agreement were agreed upon but that never were provided.

Dated: New York, New York
March 13, 2008

By:



David J. Katz

SCHLAM STONE & DOLAN LLP

26 Broadway

New York, New York 10004

Telephone No.: (212) 344-5400

Facsimile No.: (212) 344-7677

E-Mail Address: dkatz@schlamstone.com

Attorneys for Plaintiff

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

REVOLUTION HEALTH GROUP, LLC,

Plaintiff,

-against-

HUMMINGBIRD COACHING SERVICES,
LLC,

Defendant.

Index No.: 600607/08

**STATEMENT IN SUPPORT OF REQUEST FOR
ASSIGNMENT TO COMMERCIAL DIVISION**

SCHLAM STONE & DOLAN LLP

26 Broadway
New York, New York 10004
(212) 344-5400

Attorneys for Plaintiff

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART

REVOLUTION HEALTH GROUP, LLC)	INDEX NO. 08600607
)	
)	
Plaintiffs)	
)	
v.)	
)	
HUMMINGBIRD COACHING SERVICES, LLC)	<u>NOTICE OF FILING NOTICE OF REMOVAL</u>
)	
Defendants.)	


To: Clerk, Supreme Court of New York
New York County

PLEASE TAKE NOTICE that on April 9, 2008, Defendant Hummingbird Coaching Services, LLC filed with the Clerk of the United States District Court for the Southern District of New York the attached Notice of Removal.

Pursuant to 28 U.S.C. § 1446(d), this Court shall proceed no further with this action, which has now been removed to federal district court.

Dated: April 9, 2008

TAFT STETTINIUS & HOLLISTER LLP

By: 
Maria P. Vitullo
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Telephone: (513) 381-2838
Fax: (513) 381-0205
Email: vitullo@taftlaw.com

and

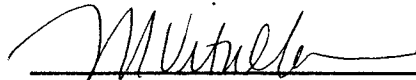
BOND, SCHOENECK & KING, PLLC
Brian J. Butler
One Lincoln Center
Syracuse, New York 13202
Telephone: (315) 218-8000
Fax: (315) 218-8100

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this
9th day of April, 2008, by regular U.S. mail postage pre-paid upon the following:

Jeffrey M. Eilender
David J. Katz
Schlam Stone & Dolan LLP
26 Broadway
New York, New York 10004



Maria P. Vitullo